



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC SUIT NO. 1060 OF 2009

KENNETH KIPLAGAT.....APPLICANT/ADVOCATE

- VERSUS -

ATTORNEY GENERAL.....DEFENDANT/CLIENT

RULING

1. This Ruling is in relation to 2 applications. Both applications are dated 10th April 2010.
2. In one application the **ATTORNEY GENERAL** has sought a stay of execution of the Ruling which the Taxing Officer delivered on 24th March 2010. It was the prayer of the Attorney General that there be a stay of execution until his intended reference was heard and determined.
3. Meanwhile, **KENNETH KIPLAGAT** has asked the court to grant him Judgment in terms of the Certificate of Taxation which was extracted from the Ruling of the Taxing Officer.
4. **KENNETH KIPLAGAT** had his Advocate/Client Bill of Costs taxed against the **ATTORNEY GENERAL**. The 2 applications before have arisen from that process of taxation.
5. For the purposes of this Ruling, Kenneth Kiplagat will be referred to as “*the Advocate*”, whilst the Attorney General will be referred to as “*the Client*”.
6. It is the case of the Advocate that the Client duly instructed him to act for the Republic of Kenya during an arbitral process, in the case of **WORLD DUTY FREE LIMITED VS REPUBLIC OF KENYA, ARBITRATION No. ARB/00/7**. That case was filed at the International Centre for Settlement of Investment Disputes (**ICSID**).
7. The Advocate’s contention was that he discharged his mandate in a professional manner. His said efforts are said to have led to the dismissal of the claim by the World Duty Free Limited.
8. However, the client thereafter refused to pay the Advocate for the costs and expenses which the Advocate incurred whilst defending the Republic of Kenya. It was that refusal to pay, that prompted the Advocate to have his Advocate/Client Bill of Costs taxed by the Taxing Officer.
9. The Advocate had presented a Bill in the sum of Kshs. 3,398,193,491.10. The Taxing Master taxed-off a total sum of Kshs. 2,797,852,240.10, leaving the sum of Kshs. 600,341,251/-.
10. A Certificate of Taxation was thereafter issued for the sum of Kshs. 600,341,251/-. It is on the basis of the said Certificate of Taxation that the Advocate now requests this court to grant judgment in his favour.
11. But the Client wants the Court to stay the execution of the Ruling by the Taxing Officer until such time as the client’s intended reference was heard and determined.
12. At this stage, the client has not yet filed a reference to challenge the decision of the Taxing Officer. The reason why the client is yet to file a reference is blamed squarely on the Taxing Officer, who is said to have failed to provide the Client with the reasons for his Ruling.
13. Pursuant to the provisions of Section 51(2) of the Advocates Act;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.

14. In effect, it is not the role of the court, when called upon to enter judgment on the basis of the certificate of taxation, to go beyond the questions;

- a. **Has the certificate of taxation been set aside or altered?; and**
- b. **Is the retainer disputed?**

15. If the certificate of taxation has not been set aside or altered, and if there is no dispute as to retainer, the Court may enter judgment for the sum certified to be due.

16. In this case, there is no doubt that the certificate of taxation has neither been set aside nor altered.

17. However, the Client says that he is desirous of challenging the Ruling which gave rise to the Certificate of Taxation. In my understanding of what the Client is saying, he intends to challenge both the retainer and the process of taxation.

18. Considering the fact that the Certificate of Taxation was issued in the year 2010, it is now 5 years later. Therefore, the question that arises is; why has not the Client actualized his intention to challenge the decision of the taxing officer?

19. The Client’s answer is that he was still waiting for the taxing officer to provide him with his reasons for the decision in issue.

20. According to the Client, the reasons had not been made available to him, even though the Client was present in court when the taxing officer delivered the Ruling.

But, how is it possible that reasons were not available to the Client, if the client was present in court when the Ruling was being delivered?

21. The client’s answer is that the learned taxing officer did not read out the whole Ruling. He is said to have only read out the dispositive part of the Ruling.

22. At paragraph 8 of his submissions, the client said;

“When asked by the Defendant to provide the reasons, the Taxing Master did not give reasons for the determination but instead directed the parties to lodge a formal request for reasons if so desired”.

23. It was the Client’s case that on 24th March 2010, he wrote to the taxing officer, requesting for reasons.

24. It is true that the Client wrote to the court on 25th March 2010. The said letter, which was copied to the Advocate, was filed in court on 26th March 2010.

25. In the letter, the client said;

“Urgently supply us with a copy of the ruling delivered on 24th March 2010 by the Taxing Master on the above taxation”.

26. The Advocate has criticized the Client for doing nothing more, after writing the letter in question.

27. But the client feels that the court should have furnished him with the reasons he had asked for or the court could have served the Ruling at the offices of the client. The third option which the client perceives to have been an avenue available to the court, was a communication from the Court to the client, inviting the client to collect the Ruling from the court.

28. It is clear from the statements made by both parties that the taxing officer read his Ruling. However, the parties do not agree on whether or not the whole Ruling was read.

29. In my considered opinion, for the purposes of the matter currently before court, it would not matter whether the taxing officer read the whole Ruling or only the dispositive parts thereof. I say so because both parties knew that the Ruling was ready and available. It is only a Ruling that is

ready which can be read out to the parties.
30. The client reasoned that;

“The Defendant was rightly entitled to persist in its quest to be furnished with reasons since the ground had uncharacteristically shifted with grave prejudice to the Defendant”.

31. Notwithstanding that stance, the client has not demonstrated to this court the manner in which it persisted in its quest to be furnished with the taxing officer’s reasons.
32. The one letter which the client wrote, does not appear to have been followed up with any other letter or action, which could be described as demonstrating the client’s persistence in its quest.
33. In any event, as I have already said, the parties both knew that the Ruling was ready. In the circumstances, I do not understand why the Client would have had any difficulty in going to the court Registry, to obtain a copy of the Ruling.
34. In my experience, it is only in respect to typed proceedings, intended for use in an appeal, that the parties wait for the court to notify them that the same were ready. But even in respect to the typed proceedings, a party who feels that there was undue delay in making ready the typed record, would normally be expected to demonstrate the steps he had taken in pushing for the speedy preparation of the record.
35. In Kenya today, the Attorney General is not required to pay court fees in respect to the Rulings and Judgments pronounced by the courts. Therefore, as the Ruling was ready by the date when it was delivered, I find no reason why the Client would have had any difficulty in collecting a copy of it from the court.
36. Meanwhile, the client appears to be casting aspersions on the court and on the Advocate by stating that whilst the court had failed to give him a copy of the Ruling, the Advocate had a copy of it.
37. I find no basis for the said aspersions or insinuations about the fact that the Advocate did get a copy of the Ruling.
38. Furthermore, the client has conceded that a copy of the Ruling in issue was attached to the Advocate’s affidavit which was sworn on 13th April 2010.
39. The said copy was not signed or endorsed as a Ruling by the taxing master. For that reason, the client appears to have had a problem accepting it as a copy of the real Ruling. Therefore, as far as the client was concerned;

“As it stands there is no Ruling furnished to the Defendant by the Court”.

40. I understand that submission to imply that until and unless the court furnished the client with the Ruling, it did not matter that a copy of it had been made available by the Advocate or by any other person. If my understanding is right, it would suggest that the most important factor was that the court should furnish the client with the Ruling.
41. In other words, the Ruling, of itself, was not as important as the need to get it from the court: that is what the client appears to be saying.
42. If the client was not so pre-occupied with the desire to only get the Ruling from the court, there should have been nothing to stop him from using the copy of the Ruling which the Advocate had provided him with, when he annexed it to the affidavit sworn on 13th April 2010.
43. Incidentally, I have not seen any letter or document in which the client asked the taxing officer to provide the reasons for the Ruling. The client’s letter asked for a copy of the Ruling. That therefore implies that the reasons were to be found in the body of the Ruling. I so find because if the reasons were not in the Ruling, the client could not have expected to get the reasons by simply getting the Ruling.
44. For the client to have concluded that if he got the Ruling, it would provide him with the taxing officer’s reasons, suggests that the client had heard the taxing officer read the Ruling.
45. However, I cannot be sure about that fact. It is also possible that the client believed that the reasons would be found in the Ruling.
46. Mr. Emmanuel Bitta, learned state counsel, deponed that on 24th March 2010, he attended court when the taxing officer delivered the Ruling in contention. According to Mr. Bitta, the taxing officer;

- i. ***Awarded Kshs. 600,341,252.00 to the Advocate;***
- ii. ***Dismissed the client's Notice of Preliminary Objection;***
- iii. ***Did not give any reasons for either dismissing the Preliminary Objection or for awarding the Advocate the costs which the client deemed to be inflated.***

47.If the taxing officer did not give reasons for his decision; and if those reasons could only made available to the parties upon receipt of a formal request for the reasons, I would have expected the client to specifically ask for **REASONS**, and not for the Ruling which did not have the reasons he was looking for.

48.By now it is obvious that I have not commented on the client's submissions on the shortcomings alleged to exist in both the process of the taxation as well as in the decision of the taxing officer.

49.My reason for refraining from doing so is that I would then be considering matters which could only be accorded consideration when the High Court was determining a reference whether or not;

- a. ***There had been procedural unfairness, perceived bias or denial of an opportunity to be heard; or***
- b. ***The taxing officer lacked jurisdiction to determine the question of retainer; or***
- c. ***The sums awarded to the Advocate were unjustified,***

were questions which could only be determined when the Court was determining a reference. But as there is no reference which has been filed, it would be premature for the court to delve into those issues.

50.I have perused the record of the proceedings and verified that the Ruling which was attached to the Advocate's affidavit sworn on 13th April 2010 is a copy of the actual Ruling which the taxing officer delivered on 24th March 2010.

51.It is not because of my so saying today that that became the Ruling of the taxing officer. The Ruling of the taxing officer became one upon its being delivered, signed and dated, on 24th March 2010.

52.Therefore, I cannot accept the client's invitation to find that it is upon my saying so today, that the time for the calculation of the period within which a reference should be preferred, should run.

53.The client submitted that the court could only grant judgment on the basis of a certificate of taxation, if no dispute exists between the parties, on the decision of the taxing officer.

54.It was said that in this case there was at least one triable issue, and that therefore, the court should not grant judgment.

55.The submission is only partially accurate.

56.Section 51 (2) of the Advocates Act states that a certificate of taxation would ordinarily be final as to the amount of the costs covered by it, unless the said certificate was either set aside or altered. Arising from that statement, the court was told, that it can proceed to make such order as it thinks fit, in relation to the certificate of taxation. In particular, section 51(2) of the Advocates Act stipulates that the court may order that judgment be entered on the strength of the certificate of taxation, unless there was a dispute as to retainer.

57.By specifying that it is in instances where there was a dispute as to retainer, that the court may not enter judgment, the statute must be understood to have expressly limited the nature of disputes which may be a bar to the grant of judgment.

58.It is not just any dispute that can become a hurdle in the court's path to granting judgment based on a certificate of taxation. The dispute must be one that relates to retainer.

59.In this case, the client has intimated that one of the challenges he wishes to raise is in relation to retainer. But because the client has not filed a reference, which would be the only forum at which that dispute can be legitimately raised, I find that currently, there is no dispute in relation to retainer.

60.Accordingly, there is no reason, in law, why the court should not enter judgment in terms of the Certificate of Taxation. I therefore allow the Advocate's application, and grant judgment in his favour for the sum of Kshs. 600,341,250.00.

61.The said sum will attract interest at the rate of 14% per annum from 14th April 2010. I so hold because the Advocate's Notice under paragraph 7 of the Advocates (Remuneration) Order was

- served upon the client on 13th April 2010.
- 62.The period of one month was calculated from that date, because the client herein is not being required to pay the costs spelt out in the Bill which the Advocate served upon him. The client is being required to pay the taxed costs.
- 63.Prior to the taxation, the client and the Advocate did not know the amount which the taxing officer would order the client to pay. Therefore, it would be unreasonable to tell the client to pay interest from 12th April 2007, when the costs which are now payable, had not yet been ascertained.
- 64.Meanwhile, as regards the client’s application for stay of execution of the Ruling delivered on 24th March 2010, I hold the view that the said Ruling was not capable of execution.
- 65.After a Bill of costs is taxed, a Certificate of Taxation is issued. It is that Certificate of Taxation which then forms the foundation upon which the court can enter judgment.
- 66.And after judgment is entered, a Decree is extracted. The said Decree would then be capable of being enforced through execution.
- 67.In this case the client asked for stay of execution of the Ruling. I am afraid that the court is unable to stay that which cannot be executed, and so its execution cannot be stayed.
- 68.But even assuming that it were possible to stay execution of a Ruling, I find that it would be improper to grant stay in this case, when the client has not yet filed a reference.
- 69.At best, the client has expressed a desire to file a reference. He has talked about an “*Intended reference*”.
- 70.Unless a reference was actually filed, it would be prejudicial to the interests of justice to put on hold the successful party on the basis of something which may or may not see the light of day.
- 71.The client is alive to the fact that he may need to seek an extension of time. That is so stated at paragraph 26 of the client’s submissions.
- 72.That being the case, it cannot yet be ascertained by this court whether or not the client will file an application for extension of time.
- 73.And if the client did apply for extension of time, I cannot tell whether or not it would be canvassed successfully.
- 74.I therefore find myself unable to grant the prayers sought in the Client’s application dated 13th April 2010. It is therefore dismissed with costs.
- 75.Finally, the costs of the Advocates application dated 13th April 2010, are awarded to the Advocate.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Oriema Okoth for the Applicant/Advocate

Miss Kilei for the Defendant/Client

Collins Odhiambo – Court clerk.